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No. ___

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MARVIN GARBER, *Petitioner*

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the jurisdictional threshold required by 18 U.S.C. §659, *Interstate or Foreign Shipments*, — that the theft be of goods moving in or as a part of an interstate or foreign shipment was satisfied where the goods in question had been released from Customs control and had remained in the warehouse at the original point of delivery because it was not economically feasible to deliver the goods to the original destination point, and the purchaser of the goods was prepared to leave the goods in the warehouse for an indefinite time with no specific plan for its ultimate disposition.

2. Should not this court impose standards of admissibility of video tape re-enactments of the alleged crime, weighing its accuracy, rele ance, and probative value considering the tremendous visual impact of this graphic medium?

3. Whether a warrantless search was valid where purported consent was obtained from a police officer by the Internal Affairs Investigative Unit of the Philadelphia Police Department without informing the police officer of the nature of the investigation, and where the police officer had an obligation pursuant to the Philadelphia City Charter to cooperate with the investigative unit or face possible dismissal from the police force.

4. Can a search warrant be obtained for the search of a man's home when a thorough and exhaustive search pursuant to a valid search warrant had taken place the day before, and no additional probable cause was given to the issuing magistrate for the need for a second search, and he was not informed as to the lack of success of the first search. In this context, does the failure to inform the issuing magistrate of the prior search and its results invalidate the second search warrant?

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* Other Parties-Petitioner Marvin Garber was a co-defendant with Nicholas Denucci. The Judgement and Opinion of the United States Court of Appeals for the Third Circuit entered July 25, 1980 likewise affirmed Mr. Denucci's conviction on the same counts as Mr. Garber.

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CITATIONS TO OPINIONS BELOW

The memorandum opinion of the District Court for the Eastern District of Pennsylvania filed July 20, 1978 denying defendants Motion for a New Trial, Motion for Arrest of Judgment is unreported.

The judgment and opinion of the United States Court of Appeals for the 3rd Circuit entered July 25, 1980 affirming Petitioner Marvin Garber's conviction of violating 18 U.S.C. 371 and 18 U.S.C. 659 is as of yet unreported and is printed in Appendix "A".

JURISDICTION

The judgment of the United States Court of Appeals for the 3rd Circuit was entered on July 25, 1980. A timely Petition for rehearing was filed, said Petition was denied on August 18, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES & ORDINANCES

18 U.S.C. 2(a) *Principals*

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

18 U.S.C. 371 *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 659 *Interstate or foreign shipments by carrier*

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or . . .

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Philadelphia City Charter Section 10-110 *Refusal to Testify*

If any officer or employee of the City shall wilfully refuse or fail to appear before any court, or before the Council or any committee thereof, or before any officer, department, board, commission or body authorized to conduct any hearing or inquiry, or having appeared, shall refuse to testify or to answer any question relating to the affairs or government of the City or the conduct of any City officer or employee on the ground that his testimony or answers would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any matter about which he may be asked to testify before such court or at any such hearing or inquiry, he shall forfeit his office or position, and shall not be eligible thereafter for appointment to any position in the City service.

STATEMENT OF THE CASE

Petitioner, Marvin Garber, was charged with offenses in four counts of Eastern District of Pennsylvania Criminal Indictment No. 78-149. Count I charged that on or about March 26, 1978 Garber did steal eight (8) copper cathodes over $100.00 in value from Northern Metal Company, which were moving as a part of a foreign and interstate shipment from Antofagosta, Chile to New York and other states. The theft being in violation of 18 U.S.C. §659. Count IV charged Garber with conspiracy to violate the substantive theft from interstate commerce and theft from Customs custody acts (18 U.S.C. §659 and 19 U.S.C. §549) in violation of 18 U.S.C. §371. Counts II and III of the indictment charged violation of 18 U.S.C. §659, possession of the stolen goods recited in Count I and violation of 19 U.S.C. §549, removing the copper cathodes from control of Customs.

On August 11, 1978 the jury returned verdicts of guilty on all four Counts as to Mr. Garber and his co-defendant, Nicholas Denucci. Motions for Arrest of Judgment, Acquittal and New Trial were filed. They were denied on July 20, 1979. A timely appeal was taken to the United States Court of Appeals for the Third Circuit and on August 15, 1980 the Circuit Court dismissed the appeal as to Counts I and IV and reversed the convictions as to Counts II and III. A Petition for Rehearing was filed and was subsequently denied. This Petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT

1.

The jurisdictional threshold required before 18 U.S.C. §659, theft of interstate or foreign shipments, can be applied was extended to a point beyond which Congress did not intend.

The copper cathodes in question here were manufactured in Chile and shipped to Philadelphia. The shipment was originally intended for Bridgeport, Connecticut but because of labor problems, they were diverted to Philadelphia. The Customs duty applicable to these goods was paid prior to the theft, and the merchandise was released from Customs control. A bond for immediate release of the merchandise was posted. The cathodes, however, remained in a warehouse within the pier itself where they had originally been delivered. Due to the inability to forward the goods to Bridgeport, Connecticut because the freight costs in reshipping would be prohibitive, Cerro, the purchaser, apparently intended to keep the merchandise indefinitely stored in Philadelphia until they were disposed of. Cerro had some customers in Pennsylvania, but there were also many customers outside of Pennsylvania. The warehouse space where the goods were stored was permanently rented by Cerro within the pier, and was usually used as a warehouse for goods that were in transit to the ultimate consumer. As to these goods, there was no ultimate customer at the time they were stored on the pier in the warehouse.

The sole jurisdictional basis for the institution of federal charges involving the merchandise is that the merchandise in question be interstate or international in nature at the time of the theft. The various precedents available to determine the international or interstate nature of the merchandise give no hard and fast rules to be applied to any particular situation, but rather as the

Court said in *U.S. v. Maddox, 394 F.2d 296* (4th Cir. 1968) "The answer in any particular case must depend on a factual assessment," of many factors to determine if the cargo had ceased to be in interstate or foreign commerce. It was the government's contention that federal jurisdiction attached to this merchandise because Philadelphia was only a temporary stop rather than the final destination of the goods. However, we not only have a situation here where Philadelphia was a temporary stop, but there was no intention to deliver the merchandise from Philadelphia to any particular place. It was the intention of Cerro to some time in the future, *if a buyer could be found,* who happened to be outside Philadelphia, deliver the goods there. This was an open-ended desire on their part and if the government's position is valid, the goods could still be considered as part of an international or interstate shipment for ten or fifteen years until they could be sold. The Court further held in *Maddox,* supra, p 299-300 that "the deposit of cargo in a warehouse may, under certain circumstances, constitute a coming to rest marking the termination of an interstate or foreign shipment. At other times, however, the stop off at the warehouse may only be a pause of any uncompleted journey. Standing alone, the removal of goods to a warehouse is not conclusive, nor is the consignees power to divert the goods from intended interstate commerce."

Thus, one must view what the halt in the flow of the merchandise in the warehouse for a period of 28 days at the time of the theft, and for seemingly an indefinite period in the future, had on their status insofar as federal jurisdiction is concerned. The Circuit Court based its conclusion that federal jurisdiction attached because the copper cathodes did not reach their final destination, and thus did not lose their foreign commerce character. What the court neglected to address was the fact that there was no destination to be reached, there was no in-

tention of removing the goods until some future date to a party unknown, at a time unknown, to a place unknown. Thus, we are led to the situation where the court has found the federal jurisdiction of an international character when goods that are in the United States have no known destination in the United States with no knowledge as to when they will leave and where they are going. For the court to hold that the goods have not reached a final resting place, is not in keeping with the intent of Congress in enacting 18 U.S.C. §659. While it is the status of the goods at the time of theft that is controlling, the copper cathodes were still in the warehouse at the time of trial. This clearly shows Cerro's intent as to what was to happen to these goods. The intent should stretch back to when the goods were delivered to the warehouse.

The Circuit Court sets forth the proposition that when goods are stored for an extensive period of time with no clear plan or idea as to final destination, they are deemed not to have come to their final resting place. This may be the case where the goods are held up due to certain known factors with a probable destination to be reached at a particular period of time. In our case, however, no destination was known when the goods arrived, when they were stolen, when the matter came to trial, or at any time. There was no continuing stream of international commerce in regard to these goods. The *Maddox*, Supra, case dealt with sugar that was stolen while it was being held pending filling of orders previously given. It is abundantly clear that Cerro had warehouse space permanently rented within the pier; that there was in fact no ultimate customer for copper cathodes, that it could not be shipped over land to Bridgeport, Connecticut nor to any place outside the Commonwealth unless cut up into various parts which Cerro was unwilling to do, that Cerro was uncertain as to the final disposition, that the goods remained at the location for a long period of time,

that complete control was made to Cerro who exercised full control and dominion over them, there was no proper base for federal jurisdiction, and it was error for the Circuit Court to so conclude. The error is the court's failure to realize that the fact that the merchandise remained in situ at the time of trial, a year later, strengthened petitioner's contention that the intent of Cerro as to the ultimate disposition of the merchandise was still vague and undefined, clearly less than Congress intended for federal jurisdiction.

2.

The court should impose standards of admissibility of video tape re-enactments of the alleged crime, weighing its accuracy, relevance, and probative value considering the tremendous visual impact of this graphic medium.

The government in its case in chief, introduced into evidence a brief video tape reenactment of the crime and had it shown to the jury. This reenactment shows a Philadelphia police car. Admittedly, it is not one of the police cars alleged to have been used by the defendants in the instant crime. The film depicted two individuals lifting a copper cathode and placing it in the trunk of the police vehicle. The government justified the use of this piece of evidence by claiming that it tended to prove that it was in fact possible for the copper cathodes to have been removed by the defendants in their police vehicles. The defense objected to the introduction of this film for a variety of diverse reasons.

First of all, in order to fit the copper cathode in the trunk of the test vehicle it was necessary for the government to build a frame platform upon which the cathode was slid into the trunk. In addition, the area around the piles of cathodes as depicted in the government film was remarkably different from the state of the area on the

night of the alleged theft. The difference consists in the fact that the area had been cleaned up appreciably by pier personnel prior to the filming of the government exhibit. The government then had easy access to the copper cathodes, and the distance which had to be walked was considerably shorter. In addition, of course, the government test was conducted during daylight hours which would also facilitate the movement of the copper cathode since the night lighting was poor. Thus, the first defense objection goes to the fact that the reenactment depicted by the government differs markedly from the circumstances under which the theft is alleged to have occurred.

Two other factual differences in the conditions under which the reenactment was depicted are significant. While the same police vehicle was not utilized, the government sought to minimize this difficulty by claiming that the car in question, while of a different year, had roughly similar trunk demensions. This did not satisfactorily explain the difference since the defendants by Court Order attempted to conduct a reenactment using the same model year car as was allegedly used in the theft. Some still photographs of that reenactment were displayed by the defense, and the policemen who conducted the experiment testified that they were unable to fit the cathode into the trunk. A slight variation in model number may have resulted in the different results in the government test. In addition, the defense presented evidence that clearly established that the car allegedly used in the theft was an old car and the shocks of that automobile were such that it could not easily withstand the additional weight of the cathode in the trunk. Thus, it is clear that the reenactment differed markedly from the circumstances under which the alleged theft occurred.

The second defense objection went to the emphasis that the jury could reasonably be expected to place on the video reenactment. The nature of the exhibit was striking and its persuasive appeal stemming from the

nature of the art medium used was greatly prejudicial to the defendants.

Lastly, the defense notes that the government presented other types of evidence which tended to substantiate their contention that it might in fact be possible to fit the cathodes into the trunk of a police vehicle. Therefore, the test had no independent significance, was unnecessary in developing the government's case, and was greatly prejudicial to the defendants. When the government announced they intended to utilize this reenactment, the defense asked permission of the Court to have the jury visit the scene of the alleged crime, supervise the accuracy of the experiment, and have the same vehicle as was allegedly utilized by the defendants to see if it was in fact possible to reenact the crime. The Court refused to allow such an experiment claiming that it would confuse the jury and was unnecessary in view of the evidence presented by both the government and the defense.

The first use of films in criminal cases appears in cases when there were film clippings taken of the actual crime itself. Thus, in two well known criminal cases, *People v. Eisenberg*, 22 N.Y.2d 99, 238 N.E.2d 719 (1968), and *Cox v. Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed. 2d 471 (1965), film clips of the actual event in question were admitted into evidence by the trial Court and the use of such films was approved by the Appellate Courts, including the U.S. Supreme Court.

Courts have been more reluctant to justify use of films in reenactment of crimes. Such reenactments have no more probative value than a statement of a proponent's theory of the case. They constitute a dramatization of the statement recorded on film. Weinstein's Evidence, §1001(2)(03). Wigmore makes a similar comment: "Theoretically, of course, the moving picture can never be assumed to represent the actual occurrence; what is seen in it is merely what certain witnesses say was the thing that happened . . . and yet any mov-

ing is apt to . . . impress the jury with a convincing and partiality of nature itself. In view of these inherent risks of misleading, the trial Judge might well deem a picture unsafe and inadmissible when the introductory evidence has not convinced him that the risk is negligible." Wigmore, Evidence §798A at page 203 (Third Edition 1940).

Most in point is the case of *DeCamp v. U.S.*, 10 F.2d 984 (D.C. Cir., 1926). In that case the Judge barred the introduction of film testimony since such evidence was wholly unnecessary in view of other evidence which had been already presented by the parties. The Court on page 120 says: "The admission of the motion pictures would have amounted to nothing more than a spectacular display of the situation based upon facts in evidence."

An examination of the case law clearly reveals substantial support for each of the objections raised by the defense. Thus, in *Collins v. B.F. Goodrich Co.*, 558 Fed.2d 908 (8th Circ. 1977), the Court said on page 910 that: "Evidence of experimental test is not admissable unless the foundation showing is made that the tests were conducted under conditions substantially similar to actual conditions." Similarly, in *Crown Cork & Seal Co. v. Morton Pharmaceutical Inc.*, 417 F.2d 921 (6th Cir. 1959), and *Glick v. White Motor Co.*, 458 F.2d 1287 (3rd Cir. 1972), the Court used the same language in insisting that the experiment must be "identical with or similar to the condition of the transaction in litigation."

In *Pacheo v. U.S.*, 367 F.2d 878 (10th Cir. 1966), the Court said the party offering evidence of an out-of-Court experiment must lay a proper foundation by showing a similarity of circumstances and conditions. The Court goes on to caution that "evidence of this kind should be received with caution and only be admitted when it is obvious to the Court from the nature of the experiment the jury would be enlightened rather than confused. In many circumstances a slight change in the

conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence and make it harmful rather than helpful." In *Smith v. U.S.*, 321 F.2d 427 (9th Cir. 1963), the trial Court refused to allow testimony as to an out-of-Court experiment conducted by the defense, but did allow a similar experiment to be conducted in the courtroom in the presence of the jury under the supervision of the Court. The Court felt that with those safeguards the experiment could safely be viewed by the jury.

In *U.S. v. Brown*, 557 F.2d 541 (6th Cir. 1977), the Court noted: "Expert testimony admitted without proper foundation may tend to confuse or mislead the trier of facts and thus defeat the defendant's right to a fair trial."

Thus, in *Kaminski v. Board of Wayne County Road Commissioners*, 121 N.W.2d 830 (Michigan 1963), the Court condemned a video reenactment of the accident since some of the alleged facts of the accident were not depicted in the reconstruction.

It is clear in the instant case that the significant differences between the circumstances under which the crime was alleged to have occurred and the circumstances depicted in the reenactment were more than "slight variations" and accordingly clearly defeated defendant's right to a fair trial and confused the jury in their factfinding role.

In *People v. Dabb*, 32 Cal. 2d 491 197 P.2d 1 (1948), the Court was justifiably concerned by the visual impact of moving films:

> "The facts . . . were unduly emphasized by the introduction of the sound motion pictures, and that unjustified importance was given to these incidents by placing them before the jury in such a compelling manner." (p.6)
>
> 197 P.2d 1,6

3.

Permission to conduct a warrantless search is invalid if such permission was obtained from a police officer who was obligated by the City Charter to cooperate with his investigating superior officers or face loss of his job and the police officer was not informed he was the subject of a possible state or federal criminal proceeding.

Prior to Petitioner Garber's arrest while he was off duty as a Philadelphia policeman he received a message from his Captain via his wife telling him to report immediately to his District Commander by direct order of the Police Commissioner. This summons was made by his Captain after being told to do so by two police inspectors who belong to the internal investigation unit of the Philadelphia Police Department. This unit's sole function is to investigate actions of fellow police officers. They operate under a grant of delegated authority directly from a Police Commissioner and are not accountable to other officers who may in fact be their superior officers while they are conducting an official internal affairs investigation. When an officer is summoned to appear in front of them and they are there by direct order of the Police Commissioner, the police officer knows that it is an internal affairs investigation. These investigations do not necessarily result in the filing of criminal charges against police officers but can deal with various forms of administrative actions, fines, demotions, suspensions, and separation from the force. By direct orders of the Police Commissioner all officers are required to cooperate with superior officers who are conducting these internal affairs investigations. If any officer would refuse to obey a direct command this is a basis for dismissal on the grounds of insubordination pursuant to Section 10-108 on the Philadelphia Home Rule Charter. When officer Garber reported to the District Commander, he found his Captain, some police inspectors who were detectives

and an internal affairs inspector temporarily assigned to the detective investigation. He was under some form of restraint as at all times a detective was assigned to monitor and watch him. The directions for him to come and go were not requests but demands placed upon a junior officer by a superior. While Garber was informed that he was being investigated in connection with the possible theft of copper from the Northern Metals pier he was never specifically told that this was a possible state or federal investigation as opposed to an internal disciplinary action by the police force. The presence of the internal affairs officer would lead him to believe that it was an internal affairs investigation. While in the presence of these officers Garber was asked if he would agree to allow the police to search his car that he had driven to work. It was also told to Garber that if he did not agree the police would get a search warrant. Garber agreed and gave the keys to the police officers who upon looking in his trunk found a pair of work gloves which were examined by the Head of the Philadelphia Police Lab and found to have traces of copper on them. The gloves at that point were left in the trunk and the next day a search warrant was obtained by the police to authorize the search and seizure of the gloves in question. When asked why the gloves were not seized upon the first identification of them it was testified to that there was a belief that the first search was possibly invalid.

It is Petitioner's contention that this search was not consensual in that it was obtained because of an implied threat to obtain a warrant and the coercion that the Home Rule Charter provides for failure to cooperate, a possible dismissal. Furthermore, Garber did not know that it was anything more than an internal affairs investigation. The setting was coercive and Garber acted upon the reasonable misapprehension of fact that he must in fact cooperate in this investigation. The misapprehension was either intentionally or unintentionally encouraged by the manner in which the police con-

ducted their investigation. The coercive nature of this investigation can be seen further by the fact that the police themselves thought they had to go out and get a warrant to validate their previous search. Whenever consent to a search is obtained by threat of obtaining a search warrant, such consensual searches should be closely scrutinized. *U.S. v. Scott* 590 F.2d 531 (3rd Cir., 1979), *U.S. v. Molt* 589 F.2d 1242 (3rd Cir., 1978).

The manner in which the consent was obtained for this search requires the greatest degree of scrutiny. In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), and *United States v. Scott*, supra, this Court held that Miranda type warnings prior to an alleged consensual search need not be given but that the Court in validating a consensual search should look to the knowledge of the defendant in the agreeing or not agreeing to the search as well as the possibly coercive nature of the consent that was obtained. While Petitioner Garber was a Philadelphia police officer in this matter and presumably was very much aware of his Constitutional rights to refuse to give permission to a search, this must be counterweighed by the provisions of the City Charter of Philadelphia which provide for dismissal if one fails to cooperate with their investigating superior officers. Particularly important here is the fact that Garber was not aware of the exact nature of the inquiry and thought it was an internal police investigation not one fraught with possible state or federal criminal consequences. The investigating officers either intentionally or unintentionally encouraged Garber to be somewhat in the dark as to the exact nature of the investigation. Further his "consent" has to be considered in light of the City Charter provisions which put his job at risk if he fails to cooperate. It would be too much to ask for Garber to have refused consent to the search then face departmental charges under the City Charter which would then have to be litigated to determine their validity particularly as he had no reason

to expect possible criminal action resulting from the inquiry being made.

Additionally, the police subsequently obtained a search warrant in an attempt to validate what they regarded as a questionable basis for the consensual search. If the first search was improper the second search would fail as fruit of the poison tree. *Wong Sun v. United States*, 371 U.S. 471 (1968).

When one looks at all the circumstances of the "consent" given as required by *United States, ex rel Harris v. Hendrix*, 423 F.2d 1096 (3rd Cir., 1970), it is clear that this was a coercive consent based upon the nature of the investigating officers and what they did and did not tell Petitioner Garber as to the purpose of the investigation and the clearly coercive effect of the Philadelphia City Charter requiring cooperation with those police officers who have the power to initiate and follow through on searches.

4.

A search warrant is invalid if obtained for the search of a man's home when a thorough and exhaustive search pursuant to a valid search warrant had taken place the day before, and no additional probable cause was given to the issuing magistrate for the need for a second search, and he was not informed as to the lack of success of the first search. In this context, does the failure to inform the issuing magistrate of the prior search and its results invalidate the second search warrant?

A second suppression error dealt with the physical search of Garber's personal residence. Police officers appeared there on March 30, 1978 with an appropriate search warrant. The warrant indicated that they were looking for copper cathodes, tools used to cut them, and clothing with copper residue. They served the first war-

rant and made the search of his home. They did not locate any tools or cathodes, and as the cathodes were approximately 4′ x 4′ and weighed several hundred pounds, their presence or absence could be easily detected. At this first search, the police observed several police uniforms which they examined and did not seize. On March 31, 1978 the same police officers again went to an issuing magistrate, obtained a second search warrant for defendant's personal home, repeating verbatim the representations of the first warrant indicating tools, copper cathodes, and clothes with copper residue. They did not indicate on the second warrant that there had been a first warrant with the same material listed thereon. When the police appeared with the second warrant, Garber was at home and they asked for his police uniforms which he gave to them. They did not search the house for copper cathodes or tools, and only asked for the clothing which they examined in the prior occasion. It was further admitted that the only reason they went back a second time was to get the uniforms, and not to look for the copper cathodes or tools. This second warrant was at least misleading, if not an overt misrepresentation to the issuing magistrate who was led to believe that the police were looking for copper cathodes and tools, when in fact they knew they were not there.

The second search warrant suggested to the issuing magistrate that the police believed that there was even the remotest possibility that the copper cathodes might be stored in petitioner Garber's home. This was not true as the premises had been searched the day before, and due to the size and bulk of the copper cathodes, there is no possibility that they had been passed over in the first search. Nowhere did the police in seeking the second warrant indicate to the issuing magistrate that they believed it would be useful to seize the uniforms even though a visual examination upon the first search failed

to suggest any incriminating value of such evidence. The issuing magistrate could then have clearly evaluated the real reason and the real motives behind the second application, and ruled accordingly. He was denied this opportunity by the misinformation given to him by the police officers. The failure to properly inform the issuing magistrate deprived him of the ability to perform his independent function and decide whether the uniforms had some evidentiary value that would require their seizure.

The purpose of the affidavit of probable cause is to present to the issuing magistrate a showing of "probable cause," that the facts alleged would allow a person of reasonable caution to believe that the defendant committed a crime, and that the evidence of the crime will be found at the location stated in the warrant, *Spinelli v. United States*, 393 U.S. 410 (1969), *Draper v. United States*, 358 U.S. 307 (1959). Here we had a search conducted of the premises the day before and revealed the non-presence of a number of the items served on the search warrant. It is very doubtful that the issuing magistrate would have found probable cause if he knew that there had been a previous search. This court has held in *Rugendorf v. United States*, 367 U.S. 528 (1964) that when a search warrant application fails to reveal a prior search in its results, the second warrant should not be issued. Of course, any omissions or misstatements done negligently would only be fatal if they are made with the intent to deceive the issuing magistrate, *United States v. Botaro*, 589 F.2d 430 (9th Cir. 1978). In our case, the affidavit of probable cause has conspicuous omissions which amount to positive misstatements of fact. They are not merely negligent failings to leave out information or to put in information, but they fail to set forth probable cause and have deprived the issuing magistrate of the opportunity to independently evaluate the grounds claimed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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October 16, 1980

Certificate of Service

I hereby certify that on this 16th day of October, three copies of the Petition for Writ of Certiorari were delivered by messenger to the Solicitor General, U.S. Department of Justice, Room 5614 Department of Justice Building, Washington, DC 20530, counsel for respondent. I further certify that parties required to be served have been served.

JOSEPH N. BONGIOVANNI, III

APPENDIX

A-1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2511

UNITED STATES OF AMERICA

v.

GARBER, MARVIN, *Appellant*

(D. C. Crim. No. 78-00149-02)

No. 79-2517

UNITED STATES OF AMERICA

v.

DENUCCI, NICHOLAS, *Appellant*

(D. C. Crim. No. 78-00149-01)

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued May 22, 1980

Before: ADAMS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges

(Opinion filed July 25, 1980)

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OPINION OF THE COURT

VAN DUSEN, *Senior Circuit Judge.*

Defendants Marvin Garber and Nicholas Denucci were charged in a four-count indictment with various offenses arising out of the theft of copper cathodes from the Northern Metal Company (Northern Metal) pier in Philadelphia, Pennsylvania, in March 1978. Count I charged that Garber and Denucci stole from Northern Metal's storage facility eight copper cathodes which were part of an interstate or foreign shipment of freight in violation of 18 U.S.C. §659 (1976). Count II charged that they unlawfully had the same copper cathodes in their possession in violation of 18 U.S.C. §659 (1976). Count III charged that they unlawfully removed copper cathodes from customs custody and control in violation of 18 U.S.C. §549 (1976). Count IV charged that they conspired with each other to violate §§659 and 549 in

violation of 18 U.S.C. §371 (1976). After a lengthy trial, a jury found both Garber and Denucci guilty on all four counts. The district court sentenced each defendant to concurrent one-year terms of imprisonment on Counts I, II and III, and to a subsequent five-year term of probation on Count IV. The defendants were also ordered to make restitution. Garber and Denucci filed timely appeals, based on several legal claims. After considering each contention raised by the defendants, we affirm the §659 conviction of theft from foreign commerce (Count I), reverse the conviction of receipt and possession of goods stolen from a foreign shipment (Count II), reverse the conviction of removal of goods from customs custody and control (Count III), and affirm the conviction of conspiracy (Count IV).

I.

Cerro Sales Corporation (Cerro) represents the country of Chile in the sale of Chilean copper in the United States. Each year Cerro sells about 70,000 tons of Chilean copper to various corporations in the United States. In 1978 one of Cerro's long-term contracts required it to sell 1200 tons of copper cathodes[1] per month to Anaconda American Brass Company (Anaconda). One of the monthly shipments of copper consigned to Anaconda was enroute from Chile to Bridgeport, Connecticut, in February 1978 when the steamship company carrying the copper experienced labor problems at several locations, including Bridgeport. Under the ocean bills of lading, the steamship company had the right to divert the cargo to other ports. In this instance the steamship company chose to discharge the cargo in Philadelphia. Cerro found that the freight costs for ship-

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1. Copper cathodes are large sheets, weighing approximately 300 pounds each. To facilitate shipping and handling, 14 sheets are bound together in a bundle.

ping the copper from Philadelphia to Connecticut were prohibitive, making delivery to Bridgeport impracticable. Cerro was thus forced to try to find other buyers for the copper. In the interim the copper cathodes remained at the Northern Metal pier, where the cargo had arrived on February 22, 1978.

In the fourth week of March 1978, a number of cathodes disappeared during the night from the warehouse at Northern Metal's pier. During that week, Garber and Denucci, while on duty as Philadelphia police officers, drove their patrol cars onto the pier on several nights and parked next to the area where the copper was stored. At these times Garber was away from his assigned police district. Garber and Denucci always left the pier at the same time, approximately 20 to 30 minutes after they had arrived. Subsequent investigations revealed that traces of copper were found in the trunks of both defendants' patrol cars and on their police uniforms.

II.

The defendants first challenge their conviction under §659, asserting that the copper cathodes were not part of foreign or interstate commerce when they were stolen. They argue that the foreign shipment had come to an end when the cargo was unloaded in Philadelphia.

Without question, a conviction under §659 can only be sustained if there is evidence that the stolen items were goods "moving as or which are a part of or which constitute an interstate or foreign shipment of freight."[2]

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2. 18 U.S.C. §659 provides in pertinent part:

"*Whoever embezzles, steals, or unlawfully takes, carries away or conceals, or by fraud or deception obtains* from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air

There is no requirement of literal movement; goods which are part of or constitute an interstate or foreign shipment are covered by the statute even if not in motion at the time of the theft. *United States v. Gollin*, 176 F.2d 889, 893 (3d Cir.), *cert. denied sub nom. Richman v. United States*, 338 U.S. 848 (1949); *United States v. Wills*, 593 F.2d 285 (7th Cir.), *cert. denied*, 441 U.S. 964 (1979); *United States v. Williams*, 559 F.2d 1243 (4th Cir. 1977); *United States v. Astolas*, 487 F.2d 275, 279 (2d Cir. 1973), *cert. denied sub nom. Edin v. United States*, 416 U.S. 955 (1974). The test for determining whether goods are part of an interstate or foreign shipment is a practical one based on common sense and administered on an ad hoc basis. *United States v. Astolas*, 487 F.2d at 279. In order to make this determination, courts look to a variety of factors, such as the relationship between the consignee, consignor, and carrier; the indicia of interstate or foreign commerce at the time of the theft; and the preservation of the congressional intent in enacting this statute. *United States v. Gimelstob*, 475 F.2d 157, 164 (3d Cir.), *cert. denied*, 414 U.S. 828

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navigation facility *with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight*, express, or other property; or

* * *

"Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, *or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen*—

"Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both." (Emphasis supplied.)

(1973); *United States v. Gates*, 528 F.2d 1045, 1047 (5th Cir.), *cert. denied*, 429 U.S. 839 (1976); *United States v. Cousins*, 427 F.2d 382, 385 (9th Cir. 1970); *United States v. Astolas*, 487 F.2d at 279. The delivery of goods to a carrier before the theft occurred, if applicable, and the physical location of the shipment when stolen are important considerations, *United States v. Astolas*, 487 F.2d at 279, but no one factor is conclusive. *United States v. Parent*, 484 F.2d 726, 729 (7th Cir. 1973), *cert. denied*, 415 U.S. 923 (1974). Rather, each case must be evaluated on its own particular facts, *United States v. Gimelstob*, 475 F.2d at 164, recognizing that §659 was designed to promote the flow of goods in interstate and foreign commerce, and that "the carrying out of this purpose is not to be hampered by technical legal conceptions." *United States v. Waroneck*, 582 F.2d 1158 (7th Cir. 1978), quoting *United States v. Astolas*, 487 F.2d at 279.

Both parties agree that the copper cathodes involved in this case constituted a foreign shipment at least until the ship docked in Philadelphia. They also agree that a foreign or interstate shipment does not lose its characteristic as such "until it arrives at its final destination and is there delivered." *United States v. Yoppolo*, 435 F.2d 625, 626 (6th Cir. 1970). Garber and Denucci contend, however, that once the shipment of copper was diverted to Philadelphia and it became clear that the copper cathodes could not be delivered to their original destination in Connecticut, Philadelphia became the final destination of that particular shipment. The Government, on the other hand, argues that Philadelphia was only a temporary stop, occasioned by an unforeseen change in route by the shipping company.[3] The Govern-

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3. Jurisdiction under 18 U.S.C. §659 (1976) can be based on shipments which are either interstate or foreign. Both parties characterize the shipment in question as foreign. The key fact is that it originated in Chile and terminated in the United States. Since the

ment emphasizes that the evidence demonstrated that Cerro did not seek to have the copper delivered to Philadelphia, did not intend to keep it there, intended to sell all the copper cathodes it imported, and at the time of the theft was seeking another party to replace Anaconda as purchaser of that specific lot of copper. We believe that a common sense view of the facts in this case requires us to agree with the Government's position. Although, at the time of the theft, Cerro did not have another specific purchaser in mind, there was uncontradicted evidence that Cerro had no use for the copper cathodes at its dock in Philadelphia, and was attempting to sell the shipment to companies located elsewhere.

Despite this evidence, the defendants vigorously assert that Philadelphia must be viewed as the final destination of the copper. Their primary argument is that the cathodes remained in Philadelphia for such an extended period of time that the shipment could not have been considered temporarily delayed. The cases explicitly hold that in determining whether interstate or foreign commerce is involved under §659, the crucial time is the time of the theft. *United States v. Gollin*, 166 F.2d 123 (3d Cir.), *cert. denied*, 333 U.S. 875 (1948); *United States v. Tyers*, 487 F.2d 828 (2d Cir. 1973); *cert. denied*, 416 U.S. 971 (1974); *Winer v. United States*, 228

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alleged jurisdictional basis is provided by the journey from outside the United States, whether it crosses state lines once it arrives in the United States is irrelevant so long as the cargo from the foreign port has not yet reached its final destination. Thus, if a shipment of goods from Chile to Pittsburgh is shipped via Philadelphia and hijacked on the leg of the journey from Philadelphia to Pittsburgh, a theft from a foreign shipment has occurred. Under the Government's theory, the copper was stolen during a temporary delay in the trip moving the copper from Chile. Whether this copper was destined for Pennsylvania or some other state was inconsequential. The crucial point is that Cerro did not intend the journey from Chile to end at the Philadelphia waterfront.

F.2d 944 (6th Cir.), *cert. denied*, 351 U.S. 906 (1956); *United States v. Hardaway*, 455 F.Supp. 226 (N.D. Ill. 1978), *aff'd*, 593 F.2d 285 (7th Cir.), *cert. denied*, 441 U.S. 964 (1979). Delays enroute do not deprive shipments of continued characterization as interstate or foreign so long as the goods have not yet reached their destination, *United States v. Augello*, 452 F.2d 1135, 1141 (2d Cir. 1971), *cert. denied*, 406 U.S. 922 (1972), and the shipper or carrier intends to resume the journey. *United States v. Maddox*, 394 F.2d 297 (4th Cir. 1968).

In the instant case, at the time the thefts began, the copper had been in Philadelphia for 28 days.[4] The defendants argue that this demonstrates that there was more than a brief delay in the journey.[5] Under the circumstances present in this instance, we do not perceive 28 days to be such an extended length of time that it necessarily converts a temporary destination into a final one. In *United States v. Augello*, 452 F.2d 1135 (2d Cir. 1971), a shipment first entered the United States when it arrived at the docks in New York. Its final destination was a warehouse located elsewhere within the state of New York. It was stolen 11 days after arrival while enroute to the warehouse. The court held that this shipment, though somewhat delayed, was still in foreign commerce at the time of the hijacking.[6] Moreover, *Unit-*

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4. The copper arrived February 22, 1978; the thefts apparently began the night of March 22, 1978.

5. The defendants emphasize that the copper cathodes were still in Philadelphia six months later at the time of the trial. This fact is deprived of its apparent relevance, however, by the defendants' concession that the time of the theft is the critical time for determining whether a shipment is foreign or interstate, and by the absence of any indication that Cerro had ceased its active pursuit of other purchasers.

6. The intended route for the shipment from the dock to the warehouse was intrastate. The court viewed the situation as an uncompleted foreign journey, and based its jurisdiction solely on the fact that the goods were still in foreign commerce at the time of the theft. *United States v. Augello*, 452 F.2d 1135, 1141 (2d Cir. 1971).

ed States v. Maddox, 394 F.2d 297 (4th Cir. 1968), upon which Garber and Denucci rely, is not to the contrary. In *Maddox*, a sugar broker regularly purchased large quantities of sugar from Puerto Rico. The sugar was shipped to Baltimore and stored temporarily in a warehouse. Maddox stole bags of sugar from the warehouse over a three-month period. The court upheld his conviction under §659, despite Maddox's claim that the sugar in the warehouse had lost its character as foreign or interstate commerce. The court stated:

> "The deposit of cargo in a warehouse may under certain circumstances constitute a coming to rest, marking the termination of an interstate or foreign shipment. At other times, however, the stop-off at the warehouse may be only a pause in the course of an uncompleted journey. Standing alone, the removal of goods to a warehouse is not conclusive; nor is the consignee's power to divert the goods from the intended interstate commerce. See Champlain Realty Company v. Town of Brattleboro, 260 U.S. 366, 43 S.Ct. 146, 67 L.Ed. 309 (1922). These are merely factors to be considered, but there is no rigid rule of law that mandates a holding either way. The answer in any particular case must depend on a factual assessment."
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> ". . . There is no absolute requirement that the flow of commerce be continuous if there is the clear intention to resume after a brief pause."

Id. at 299-300. After reviewing the record, the court concluded that the sugar was part of a "continuing, though interrupted, shipment in commerce." *Id.* at 300. Garber and Denucci seize on the statement in *Maddox* that the flow of commerce may be interrupted so long as there is the intention to resume the journey after a brief pause. The linchpin of their argument is that 28 days cannot be considered a brief pause. Our reading of *Maddox* does

not lead to such an inelastic definition of "brief pause." First, we point out that *Maddox* is silent as to the length of time the sugar had been in the warehouse at the time of the theft. Second, we note the *Maddox* court's remonstration that there are no rigid rules in determining whether goods have come to rest, and that ad hoc decisions must be made based on the particular facts of each case. In light of these considerations, we conclude that the 28 days the copper cathodes were in Philadelphia before the time of the theft did not in themselves deprive the shipment of its foreign character.[7]

Furthermore, in a slightly different context courts have often ruled that a substantial delay in one state does not necessarily cause an item to lose its interstate character. For example, to support a conviction under 18 U.S.C. §2313 (1976), which outlaws the sale or receipt of stolen vehicles, the Government must show that at the time of the crime the vehicle in question was moving in the "stream of interstate or foreign commerce" and had not yet come to rest within a state. *United States v. Hiscott,* 586 F.2d 1271, 1274 (8th Cir. 1978). In *United States v. Baker,* 452 F.2d 21 (5th Cir. 1971), *cert. denied,* 405 U.S. 974 (1972), a truck was stolen and transported across state lines to its destination state. It remained there for three months and was used personally during that time by a dealer in stolen goods. He "revealed no intention of keeping it," however, and sold it to

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7. We emphasize once again that at the trial there was undisputed evidence that Cerro continued its active pursuit of purchasers for the copper throughout this period. While it may be that in other circumstances, e. g., if the seller made no attempt to seek other buyers or if the shipment consisted of a non-fungible commodity without a steady market, a period of 28 days might be seen as evidence of something other than a temporary pause, we do not have such a case before us.

Baker. *Id.* at 24. The court upheld Baker's conviction under §2313, stating:

> "Admittedly, [the dealer] had the vehicle in his possession for three months. Time, however, is not conclusive but rather one of the facts to be considered in determining whether a vehicle is in interstate commerce. We cannot say, as a matter of law, that the vehicle in this case lost its interstate character."

Id. Similarly, in *United States v. Tobin*, 576 F.2d 687 (5th Cir.), *cert. denied*, 439 U.S. 1051 (1978), the defendants attacked as invalid their convictions under 18 U.S.C. §2315 (1976) for receiving and selling stolen property which was moving in interstate or foreign commerce by emphasizing that two years had elapsed since the stolen items had crossed state lines and entered the destination state. They argued that this definitively proved that the stolen items had come to rest and thus had lost their interstate character. The court ruled that simply because goods reach the state where they are intended to be sold does not deprive the goods of their interstate character. *Id.* at 692. Rather, so long as the transfer of goods can be considered a continuation of the movement that began outside the state, the interstate commerce jurisdictional requirement is fulfilled. *Id.* Additionally, long delays do not necessitate a finding that items left interstate commerce. Specifically, the *Tobin* court that the two years which had elapsed between the time the items entered the destination state and the time of the attempted sale did not require a finding that the items had come to rest before the sale.

In light of the cases interpreting §659 and similar jurisdictional provisions in §§2313 and 2315, we conclude that in this case the 28 days between arrival of the copper in the United States and the theft do not require that the shipment be viewed as one which had lost its foreign character.

Garber and Denucci base their secondary attack on the jurisdictional prerequisite for §659 on the fact that at the time of the theft Cerro had no specific purchaser of the copper in mind. They acknowledge that Cerro presented uncontradicted testimony that it could not use the copper cathodes itself in Philadelphia and was trying to locate buyers for the copper. Nevertheless, Garber and Denucci reiterate that unless there is a clear intention to resume, storage at a warehouse constitutes the termination of a foreign or interstate shipment. They further assert that in order for there to be sufficient intent to resume the journey, there must be a specific ultimate destination in mind. We are not persuaded by this argument. Although generally shippers will have a specific final destination in mind, there are instances — and this case is one of them — when this will not be so.[8]

Case law provides us with other telling examples. *United States v. Gates*, 528 F.2d 1045 (5th Cir.), *cert. denied*, 429 U.S. 839 (1976), presents a factual situation quite similar to the one at hand. In *Gates*, a carton was shipped from New York to Georgia for delivery to the consignee in Atlanta. The consignee, however, refused to accept delivery. The carton was stolen in Atlanta while the truck was enroute to the local terminal. The defendant attacked his conviction under §659, asserting that the goods were in local transit at the time of the

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8. Defendants' insistence that in order to characterize a shipment as one involved in an ongoing journey, rather than as one which has come to its final destination, the seller must in every instance have a specific purchaser in mind is too inflexible. It would lead to such anomalous results as sustaining a conviction under §659 if goods were stolen from a pier so long as the shipper thought that the consignee intended to come pick up the shipment, but reversing a conviction under §659 if the same goods were stolen one hour after the consignee had just cancelled the contract and refused to pick up the shipment, suddenly leaving the shipper without a consignee.

theft. The Fifth Circuit sustained the conviction, stating that the fact that the consignee had refused delivery did not mean the goods lost their interstate character.

> "There is no need to employ complex fictions about legal title to arrive at an artificial result. The facts of this case strongly indicate that the stolen goods were part of a continuing interstate shipment. Final delivery was never effected. In fact, the goods were stolen before they were ever removed from the truck by an employee of the carrier. That Baron's initially rejected the shipment is not controlling. The carton retained its interstate character despite the aborted delivery and the fact that were it not for the theft, the carrier would have been forced to make arrangements to dispose of the shipment, presumably at the direction of the consignor.

Id. at 1047-48. In *United States v. Maddox*, 394 F.2d at 299, discussed above at pages 8-9, the Fourth Circuit affirmed a conviction under §659 for theft of sugar from a warehouse. A sugar broker regularly imported large quantities of sugar from Puerto Rico. It arrived in the United States at Baltimore, where regular customers picked up 40% to 60% of each shipment directly from the pier. The rest of the sugar was stored temporarily in a warehouse in Baltimore. Approximately 70% of the warehoused sugar was held to meet pre-existing contracts with buyers in surrounding states. The defendant stressed that the sugar stolen from the warehouse was no longer in foreign commerce since the individual bags were not earmarked for any particular buyer, the sugar broker could do with the sugar as he saw fit, and a significant portion of the sugar had not yet been sold. Despite these facts, the court held that an assessment of all the circumstances of the case indicated that the sugar had not left interstate commerce. In *United States v. Thomas*, 396 F.2d 310 (2d Cir. 1968), 67 cartons arrived in New York from Japan pursuant to the order of an im-

porter located in New York City. Seven days later a trucking company, acting as agent for the importer, removed the cartons from the pier and took them to the trucking company's warehouse. That same day two cartons were stolen. The cartons were not earmarked for specific buyers. At the time of the theft, the importer had received orders for 56 cartons. The remaining 11 were to be held at the importer's New York warehouse pending further orders. Under these facts, even though it was unclear whether the two cartons stolen were those for which orders had been received or not, the court sustained convictions for violating §659.[9]

In the case at bar there was, in effect, an aborted delivery to Anaconda. Cerro was, therefore, forced to make other arrangements to dispose of the shipment. The fact that these arrangements had not been made at the time of the theft, when coupled with the fact that Cerro was unexpectedly faced with the arrival of a shipment of approximately 500 tons[10] of copper cathodes in a port with no purchasers situated nearby, does not, in our view, deprive the shipment in question of its foreign character.

To summarize, taking a common sense approach to the realities of this situation, we do not believe that the unforeseen delivery to Philadelphia, with the consequent cancellation of the agreement that this particular shipment would go to Anaconda in Connecticut, thus necessitating that Cerro attempt to find alternative pur-

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9. The court in *United States v. Thomas*, 396 F.2d 310 (2d Cir. 1968), emphasized the fact that many of the cartons were ultimately destined for delivery out of state. Nonetheless, in light of the fact that the journey originated in Japan and was continuing, though it had been temporarily interrupted in the United States, the court affirmed the trial court's finding that "the cartons were 'in interstate or foreign commerce' when they were [stolen]." *Id.* at 315.

10. There was testimony that the shipment of copper consisted of 3,262 cathodes. App. at 124a. Each cathode weighs approximately 300 pounds. *Id.* Therefore, the total shipment of copper weighed approximately 978,600 pounds, or nearly 500 tons.

chasers for the copper, deprived this shipment of its foreign character. Nor do we think that the fact that at the time of the theft Cerro had been unsuccessful for the previous 28 days in locating buyers for the cathodes requires a finding that the shipment had come to rest at its final destination. Rather, we are persuaded that, in the circumstances of this case, Cerro's active pursuit of alternative purchasers demonstrates Cerro's intent to resume the shipment as soon as possible. This intent is dispositive and supports the conclusion that, at the time of the theft, the shipment of copper cathodes had not reached its final destination and had not lost its foreign commerce character. Because we conclude that the defendants' challenge to the jurisdictional basis of their convictions for violating §659 fails, we affirm the judgment of conviction of Count I.

III.

The defendants also challenge their conviction for possession of stolen goods under §659.[11] Garber and Denucci assert that they could not properly be convicted of both theft from an interstate shipment and possession of goods stolen from an interstate shipment when the same goods were at issue in both charges. We agree with their argument insofar as it attacks the sentences for possession of stolen goods under §659. A review of the recent cases reveals that courts have carefully examined this and similar statutes to determine the congressional intent in punishing multiple aspects of the same criminal act. The Supreme Court in *Heflin v. United States*, 358 U.S. 415 (1959), was faced with a defendant who had multiple convictions under 18 U.S.C. §2113 (1976)

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11. The text of the pertinent provisions of §659 appears at note 2, *supra*.

arising from one bank robbery. The defendant was convicted of violating §2113(d) in unlawfully taking the funds and of violating §2113(c) in unlawfully possessing the same funds. The Court, stating that "we resolve an ambiguity in favor of lenity when required to determine the intent of Congress in punishing multiple aspects of the same criminal act," *id.* at 419, held that subsection (c) was designed to reach a new group of wrongdoers, those who only received the money from the robbers, not to increase the punishment of those who actually robbed the bank. Therefore, only one conviction was allowed to stand. A similar situation presented itself in *United States v. Gaddis*, 424 U.S. 544 (1976). The defendants had been convicted of robbing a bank and of possessing the funds stolen in the robbery. The appellate court held that it was plain error to allow the jury to convict an individual both of taking and of possessing the money obtained in one robbery, reversed the judgments of conviction, and ordered a new trial. The Supreme Court agreed that the defendants could not be convicted of both counts, ruling that the trial judge should have instructed the jury to consider, first, the theft charge, and only consider the possession charge if they found insufficient proof that the defendants actually participated in the robbery. The Court, however, disagreed that a new trial was necessary, and held that the error could be fully corrected by simply vacating the conviction and sentence under the possession count. *Id.* at 549, 552.

The Sixth Circuit adopted this approach in reviewing multiple convictions under §659 in an opinion by our colleague, Judge Adams, sitting with the U. S. Court of Appeals for the Sixth Circuit. *United States v. Solimine*, 536 F.2d 703 (6th Cir.), *vacated on other grounds*, 429 U.S. 990 (1976), *cert. denied sub nom. Sclafani v. United States*, 430 U.S. 918 (1977). Finding "no indication in the sparse legislative history of section 659 that Con-

gress intended to regard each theft from interstate shipment as a multiplicity of discreet offenses so that the punishment for such theft could be enhanced," *id.* at 710, the court concluded that the section of the statute outlawing possession of goods stolen from an interstate or foreign shipment was an attempt to bring within the scope of the criminal law a different class of wrongdoers from the actual participants in the theft. Holding that convictions of theft from interstate shipment and of receipt and possession of the same property could not both stand, the court vacated the conviction and sentence with respect to the possession count. *Id.* at 711. In *United States v. Gilbert*, 553 F.2d 990 (5th Cir. 1977), the Fifth Circuit explicitly followed *Solimine* and held that under §659 the defendant could not properly be convicted of both theft from interstate freight shipments and possession of the proceeds of the theft. Even more recently, the Second Circuit has taken a similar approach. In *United States v. DiGeronimo*, 598 F.2d 746 (2d Cir.), *cert. denied*, 100 S.Ct. 180 (1979), the court held that the defendants' convictions of interference with interstate commerce by means of robbery in violation of 18 U.S.C. §1957 (1976) and of knowing receipt and possession of goods stolen from interstate commerce in violation of 18 U.S.C. §659 were improper. Acknowledging that convictions under two different statutes were involved, unlike the situations presented by *Heflin*, *Gaddis*, and *Solimine*, the court nonetheless ruled that the convictions were multiplicitous. It viewed the charge of theft under §1951 as the functional equivalent of a charge under the theft provisions of §659. Finding no support in the legislative history of either statute for the proposition that Congress wanted to "punish separately and cumulatively the crimes of robbing a truck of its contents and receiving the stolen goods," *id.* at 751, the court vacated the conviction and sentence with respect

to the possession count.[12] *See Busic v. United States*, 48 U.S.L.W. 4535, 4538 (May 19, 1980), citing *Simpson v. United States*, 435 U.S. 6 (1978).

This review of the decisional law convinces us that the convictions of Garber and Denucci under §659 for both theft from a foreign shipment and receipt and possession of goods stolen from a foreign shipment are multiplicitous. Since the jury's verdict indicates that it made factual findings that both defendants participated in the theft and then kept the proceeds, we may conclude that a properly instructed jury would have stopped after making the first finding (see discussion of *Gaddis* at page 15 above). Therefore, the proper remedy is to vacate the conviction and sentence with respect to the possession count. *Id.* at 711. Accordingly, we must vacate the judgments of conviction and the sentences imposed on Garber and Denucci under Count II.

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12. Our decision in *United States v. Gomez*, 593 F.2d 210 (3d Cir. 1979) (en banc), is not to the contrary. In *Gomez* the defendant was convicted of two offenses under 21 U.S.C. §841(a)(1) (1976): distribution of cocaine and possession with intent to distribute cocaine. The court affirmed both of the convictions, but vacated the sentences in order "to effectuate the congressional intent to prevent sentence pyramiding, and to avoid the anomalies of a technical application of the merger theory." *Id.* at 217. *Gomez* explicitly noted that the Supreme Court held in *Gaddis v. United States*, 424 U.S. 544 (1976), that under the federal bank robbery statute, 18 U.S.C. §2113 (1976), "a jury should be instructed that it can convict a defendant for either robbery or receiving, but not for both." 593 F.2d at 217 n. 20. This principle applies to the instant case where the defendants were convicted of theft from a shipment in interstate or foreign commerce and of possession of goods stolen from interstate or foreign commerce. *Gomez*, which arises out of a different statute concerning drug transactions, as opposed to theft, is factually distinguishable from the case at hand. In *United States v. Dowling*, ____ F.2d ____ (July 9, 1980, 3d Cir. Nos. 79-2130/31 & 80-1444/45), this court vacated in certain situations only the sentences, as opposed to the convictions.

IV.

Garber and Denucci appeal, in addition, from their conviction of removing goods from customs custody in violation of §549. They argue that the copper cathodes were not in customs custody in March 1978 when they were stolen. The Government, acknowledging that the copper was located at the pier outside the north end of the Northern Metal warehouse and not in a facility operated by the Customs Service, contends that the cathodes were in constructive customs custody in March 1978. Section 549 provides in pertinent part:

> "Whoever, maliciously enters any bonded warehouse or any vessel or vehicle laden with or containing bonded merchandise with intent unlawfully to remove therefrom any merchandise or baggage therein, or *unlawfully removes any merchandise* or baggage in such vessel, vehicle, or bonded warehouse or *otherwise in customs custody or control*
>
> * * *
>
> [s]hall be fined not more than $5,000 or imprisoned not more than two years, or both." (Emphasis supplied.)

Courts which have interpreted this statute have held that goods imported into this country are in constructive customs custody from the moment of their arrival in the United States until their release by the Customs Service, regardless of whether the Customs Service has actual physical possession. *United States v. Harold*, 588 F.2d 1136, 1142 (5th Cir. 1979); *Mungo v. United States*, 423 F.2d 1351, 1354 (4th Cir. 1970).

In the instant case the copper had recently arrived in the United States from Chile. Constructive customs custody had thereby been established. The dispute centers on whether four weeks after arrival the Customs Service had released the shipment, thus extinguishing

customs custody. An examination of the record before us reveals that the cargo arrived in Philadelphia on February 22, 1978. The copper in question was accepted by Northern Metal on February 25.[13] At the time of unloading, the steamship company counted the copper bundles in the cargo. When Northern Metal took delivery from the ship, it transferred the bundle count onto a warehouse certificate, which it forwarded to Cerro.[14] A bond for immediate delivery had already been posted under which the Customs Service could release goods prior to the payment of the exact amount of the duty.[15]

As noted earlier, this shipment was originally consigned to Anaconda in Bridgeport, Connecticut, but was discharged in Philadelphia because it had unexpectedly been rerouted by the steamship company. At the time it was unloaded in Philadelphia, a substitute consignee had not yet been located. The Government relies on this fact, contending that goods are released from customs custody only when the consignee accepts delivery from the shipper. Unfortunately, the Government provides us with no statutory or decisional authority for this contention.[16] Therefore, we have found it necessary to review the statutory scheme regulating imported goods.

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13. Government Exhibit 6, introduced at trial, documents this fact.

14. App. at 147a.

15. App. at 178a-182a; App. at 143a.

16. The Government asserts that goods are released from customs custody when they are "permitted," or authorized to be delivered to the next consignee, but cites no support for this assertion. It does not point to a single statute or case involving customs custody in which the word "permitted" is used. The Government turns to 19 C.F.R. §158.1 to locate the definition of "permitted." Unfortunately, this regulation sheds no light on this issue. It concerns relief from duties paid on lost, damaged, abandoned, or exported merchandise, see 19 C.F.R. §158.0 (1979), a different problem from the one at hand. While it defines "permitted," it does so solely for the purpose of Subpart A, that portion of the regulation regarding lost or missing

The Tariff Act of 1930, 19 U.S.C. §§1303-1677g (1976), sets forth an orderly procedure for ascertaining and collecting duties. A portion of the Act, §1499, while not phrased in terms of "release," appears to refer to the concept involved. It provides in part:

> "Imported merchandise, required by law or regulations made in pursuance thereof to be inspected, examined, or appraised, *shall not be delivered from customs custody, except under such bond* or other security as may be prescribed by the Secretary of the Treasury to assure compliance with all applicable laws, regulations, and instructions which the Secretary of the Treasury or the Customs Service is authorized to enforce *until it has been inspected, examined, or appraised and is reported by the appropriate customs officer to have been truly and correctly invoiced and found to comply with the requirements of the laws of the United States.*" (Emphasis supplied)

From this statute we conclude that, generally, customs custody of imported goods continues until the merchandise has been inspected, found to be correctly invoiced, and found to otherwise comply with the laws of the United States. *See Mungo v. United States*, 423 F.2d at 1357. Further, once the inspection and the requisite findings have been made — or, if a proper bond is filed, before the statutory duties are carried out — the goods can be released from customs custody.[17]

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packages and deficiencies in contents of packages. It is silent as to the genesis of the term "permitted." Furthermore, although there is reference to theft while in customs custody in Subpart C, the word "permitted" never appears in that subpart.

17. Another portion of the Act also addresses the issue of release from customs custody. Section 1484(j) provides in part:

> "(j) Merchandise shall be released from customs custody only to or upon the order of the carrier by whom the merchandise is brought to the port at which entry is made, except that mer-

Applying these principles to the facts presented by this record, we conclude that the copper cathodes had been released from customs custody at the time of the theft. We emphasize that a sufficient immediate delivery bond had been posted, that Northern Metal had accepted delivery from the ship and had transferred the ship's bundle count to its warehouse certificate, that 28 days had elapsed since the cargo had arrived in the United States, and that there was no representation by the Government that the Customs Service intended to make any further inspection, examination, or appraisal of the shipment. In view of these circumstances, we believe that the fact that a specific consignee had not yet been named is insignificant. Although, in the usual case, a shipment unloaded at the dock would be earmarked for a

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NOTE 17 — *(Continued)*

chandise in a bonded warehouse shall be released from customs custody only to or upon the order of the proprietor of the warehouse. The customs officer shall not be liable to any person in respect of the delivery of merchandise released from customs custody in accordance with the provisions of this section. Where a recovery is had in any suit or proceeding against a customs officer on account of the release of merchandise from customs custody, in the performance of his official duty, and the court certifies that there was probable cause for such release by such customs officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such customs officer, but the amount so recovered shall, upon final judgment, be paid out of moneys appropriated from the Treasury for that purpose."

Although a literal reading of this section might indicate that a prerequisite to release is an order from the carrier, we believe that this section is not controlling in the case before us. This provision appears to concern the liability of the Customs Service in a bailment situation when actual custody and control is involved. We are confronted with an instance of constructive, not actual, custody. We find §1484(j) unhelpful in illuminating when release from constructive customs custody occurs.

particular consignee and that shipment would be released directly to the consignee or its agent after a short time on the pier, this is not the usual case. The unintended delay of the instant shipment while Cerro sought an alternative purchaser did not increase the governmental interest in the goods. In the absence of any indication that the Customs Service intended to make any further examination or appraisal of the shipment, we hold that in this case the goods had been released from constructive customs custody at the time of the theft.

We note that the cases we have reviewed on this issue are not to the contrary. In *United States v. Harold*, 588 F.2d at 1136-37, the defendant was employed as a dock foreman. On the very day the cargo was being offloaded, he removed five cartons from the ship's cargo containers and attempted to place them into his car, rather than into the warehouse where they were to be stored. The court upheld his conviction under §549, emphasizing that there had not even been a chance for the Customs Service to inspect the goods or authorize them for delivery. In *Mungo v. United States*, 423 F.2d at 1352-53, a ship had arrived carrying a container of imported Scotch whiskey. The container was unloaded from the ship and placed on a flatbed trailer parked next to the warehouse at the dock. Four or five days later, the defendants were apprehended removing cases of whiskey from the container. In sustaining the §549 conviction, the court stated that the final inspection before release of the whiskey from customs custody had been scheduled but had not yet taken place at the time of the theft.[18] The short length of time which had passed since the ships in *Harold* and *Mungo* had arrived and the fact

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18. The final inspection was scheduled to be performed during the working hours of February 27. The defendants had removed the cases a few hours earlier, at 12:35 a.m. on February 27. *Mungo v. United States*, 423 F.2d 1351, 1357 (4th Cir. 1970).

that there were specific customs inspections yet to be performed distinguish these cases from the one at bar.

Therefore, guided by the principle that criminal statutes should be strictly construed, we conclude that under the pertinent statutory and decisional authority the copper cathodes in this case were no longer in customs custody at the time of the theft. Accordingly, an essential element of the offense prohibited by §549 is missing, and we must reverse the judgment of conviction on Count III.

V.

After careful consideration of other grounds for reversal advanced by appellants, which are enumerated in the Appendix to this opinion, we have concluded that such grounds are without merit.

VI.

In conclusion and recapitulation, our review of the issues presented by these appeals convinces us that the copper cathodes had not reached their final destination at the time the theft occurred, and therefore were still part of a foreign shipment. Thus, the convictions for theft from a foreign shipment in violation of §659 were proper. Since the defendants were convicted of theft of the copper, the convictions under §659 on the possession charge were improper and will be reversed. Furthermore, the facts of this case indicate that the shipment of copper was not still in customs custody at the time of the theft. Thus, the convictions under §549 must be reversed. Accordingly, we will vacate the judgments

with respect to the sentences imposed for receipt and possession of goods stolen from a foreign shipment and for removal of goods from customs custody. In all other respects, we will affirm the district court judgments of conviction and sentence.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX

Garber and Denucci also advance the following other grounds which they assert warrant reversal of their convictions:

(A) insufficiency of the evidence to sustain convictions of conspiracy under 18 U.S.C. §371;[19]

(B) jury verdicts contrary to the weight of the evidence and unsupported by substantial evidence which reasonable men could be convinced beyond a reasonable doubt was true;[20]

(C) misconduct of the prosecutor in offering photographic exhibits representing the scene of the alleged crime which were not properly authenticated, in intimidating a defense witness while still under oath, and in introducing co-defendant's statement which the prosecutor failed to disclose under Fed. R. Crim. P. 16;[21]

(D) admission of evidence which should have been suppressed because the photographic identifications were impermissibly suggestive, because the consent to the first search was not voluntarily given, because the search warrants were not based on probable cause and lacked the necessary specificity, because the magistrate who issued the second search warrant was not informed of the fact that a prior search had taken place, and because the statements obtained were involuntary and the product of coercion;[22]

(E) admission of statements without a showing that such statements were in furtherance of a conspiracy and also in violation of *Bruton v. United States*, 391 U.S. 123 (1968);[23]

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19. Item 4 of appellant's brief at No. 79-2517. It is noted that appellant at No. 79-2511 incorporated, at page 37 of his brief, all the compatible arguments of appellant at No. 79-2517.

20. Item 5 of appellant's brief at No. 79-2517.

21. Item 6 of appellant's brief at No. 79-2517.

22. Item 7 of appellant's brief at No. 79-2517 and Item IV (p. 26) of appellant's brief at No. 79-2511.

23. Item 8 of appellant's brief at No. 79-2517.

(F) refusal to grant defendant's motion for bill of particulars which would have enabled him to prepare adequately for trial;[24]

(G) admission of a video tape re-enactment of the alleged crime without a proper foundation, which lacked probative value and was highly prejudicial, and failure to give limiting instructions on the evidentiary value of the video tape film;[25]

(H) admission of proof in variance with the indictment;[26]

(I) admission of inadmissible evidence in the nature of legal opinions dealing with the ultimate issue at trial;[27]

(J) undue restriction of defense counsel's cross-examination of a Government witness regarding his refusal to undergo a polygraph examination;[28]

(K) admission of photographic exhibits which were not authenticated;[29]

(L) refusal to allow an on-site inspection of the crime scene or an actual demonstration of the events introduced by the Government through its video tapes;[30]

(M) exclusion of relevant and probative evidence concerning the frequency of thefts which would have effectively refuted the Government's theory of the case;[31]

(N) admission of evidence of defendant's prior activities;[32]

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24. Item 9 of appellant's brief at No. 79-2517.

25. Item 10 of appellant's brief at No. 79-2517 and Item 11 (p. 16) of appellant's brief at No. 79-2511.

26. Item 11 of appellant's brief at No. 79-2517.

27. Item 12 of appellant's brief at No. 79-2517.

28. Item 13 of appellant's brief at No. 79-2517 and Item III (p. 24) of appellant's brief at No. 79-2511.

29. Item 14 of appellant's brief at No. 79-2517.

30. Item 15 of appellant's brief at No. 79-2517.

31. Item 16 of appellant's brief at No. 79-2517.

32. Item 17 of appellant's brief at No. 79-2517.

(O) improper interference by the court with the examination of witnesses by rehabilitating Government witnesses and extensively cross-examining defense witnesses;[33]

(P) instructions to the jury which erroneously stated the law and unduly stressed the Government's case;[34]

(Q) denial of request to interrogate all jurors and erroneous restriction of the examination of two jurors.[35]

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33. Item 18 of appellant's brief at No. 79-2517.
34. Item 19 of appellant's brief at No. 79-2517.
35. Item 20 of appellant's brief at No. 79-2517.